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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

RICARDO AVILA,

Defendant and Appellant.

B263496

(Los Angeles County
Super. Ct. No. BA423043)

APPEAL from a judgment of the Superior Court of Los Angeles County. Lisa B. Lench, Judge. Judgment affirmed and remanded for resentencing.

Maxine Weksler, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Zee Rodriguez and Andrew S. Pruitt, Deputy Attorneys General, for Plaintiff and Respondent.

Ricardo Avila appeals his conviction for felony battery and assault, and challenges his sentence. He contends that substantial evidence does not support his conviction and that the trial court erred when it imposed a three-year enhancement on the battery sentence. We disagree with the former and agree with the latter.

FACTS AND PROCEEDINGS BELOW

A. Information

An information filed by the Los Angeles County District Attorney's Office charged Avila with the following felony offenses: (1) discharge of a firearm with gross negligence, in violation of Penal Code¹ section 246.3, subdivision (a) (count 1); (2) dissuading a witness, in violation of section 136.1, subdivision (b)(1) (count 2); (3) two counts of possession of an assault weapon (an AK-47), in violation of section 30605, subdivision (a) (counts 3 and 6); (4) two counts of battery with serious bodily injury, in violation of section 243, subdivision (d) (count 4 [against Officer Jessica Martinez] and count 5 [against Officer Jose Vazquez]); and (5) two counts of assault upon a peace officer by means likely to produce great bodily injury, in violation of section 245, subdivision (c) (count 9 [Officer Martinez] and count 10 [Officer Vazquez]).

The information further alleged: (1) as to count 4, Avila personally inflicted great bodily injury, pursuant to section 12022.7, subdivision (a); (2) as to counts 2, 4, and 5, that Avila committed the offenses for the benefit of a criminal street gang, pursuant to section 186.22, subdivisions (b)(1)(a) and (b)(4); (3) as to all counts, Avila suffered a prior serious felony conviction and one prior prison term, constituting a strike within the meaning of California's

¹ All subsequent statutory references are to the Penal Code unless otherwise indicated.

“Three Strikes” law, in violation of sections 667, subdivisions (a)-(j), 1170.12, subdivisions (a)-(d) and 667.5, subdivision (a).

Avila pleaded not guilty and denied the special allegations. The case proceeded to trial by jury.

B. *Prosecution Evidence*

1. *Avila Shoots Corona with an AK-47 Assault Rifle*

Ashley Corona testified that on March 26, 2014, she and Gerardo Becerra, Avila’s co-workers, went to Avila’s home in Boyle Heights. Avila and Bacerra were drinking beer and talking while Corona listened. Avila then suggested that they go outside. Before leaving the house, Avila grabbed an AK-47 assault rifle and said he “was going to patrol his hood.”

The three went outside, and Avila and Becerra continued talking while Corona sat on the ground. At one point, Corona said something that “made [Avila] angry,” Avila approached Corona, holding the gun in his right hand, and as they were arguing, he shot her in the leg. Avila then said to Becerra, “You’re next, little bitch.” Avila returned to the house, and Bacerra carried Corona across the street, and sat her down in the back seat of Avila’s car. Avila then got into the car, apologized to Corona for shooting her, and drove to the hospital. When they arrived at the entrance of the emergency room, Becerra carried Corona out of the car into the hospital, and Avila drove away. The gunshot broke Corona’s tibia and she underwent surgery, followed by physical therapy.

While Corona was in the hospital, she was contacted by police officers. Although initially uncooperative, she began to talk and identified Avila from a six-pack photographic lineup as the person who shot her. She told police officers that on the night she was shot, she had been drinking alcohol and argued with Avila, who shot her and then apologized.

2. *Avila's Arrest and Altercation With
Officers Vazquez and Martinez.*

On the evening of March 27, 2014, at the beginning of their shift, Los Angeles Police Department (LAPD) Officers Vazquez and Martinez were briefed on the shooting of Corona by Avila the previous day. Officer Vazquez was familiar with Avila from the approximately 20 contacts he had with appellant in his capacity as an officer previously assigned to monitoring the criminal street gang, Varrio Neuvo Estrada (VNE), which operated in east Los Angeles from Boyle Heights to Montebello.²

At approximately 4:30 a.m., while they were on patrol, Officers Vazquez and Martinez drove by the Estrada Courts projects and saw Avila and his mother standing outside a parked vehicle. The officers immediately initiated a felony stop. They requested backup and exited the patrol car. Avila and his mother were standing behind a vehicle that was parked along the street, and Officer Martinez could only see Avila from the “shoulders up” so Officer Martinez moved “to get a better line of sight.”

Officers Vazquez and Martinez drew their weapons and commanded Avila to stop, show his hands and step away from the vehicle. Avila did not comply, and both officers testified that he attempted to open the door to the vehicle next to him. After Avila failed to open the car door, he moved away from the vehicle and toward Officer Martinez with his fists clenched. Avila’s mother stepped in front of Avila and yelled at the officers to leave Avila alone. Officer Vazquez again commanded Avila to raise his hands, but Avila did not comply. Instead, Avila responded, “What the

² Because the jury was hung on the gang allegations, and that issue is not relevant to this appeal, we omit the testimony related to Avila’s alleged gang membership or affiliation.

fuck you want, motherfuckers?” And he told them to “fuck off.” The officers ordered Avila’s mother to step aside, but she did not.

As Officer Martinez began to holster her gun and engage the retention strap, Avila moved rapidly toward her. Avila’s mother also moved towards the officers, and Officer Martinez moved backward, holding her hand out in an attempt to hold the mother away. Avila stepped forward and “launched over” his mother, punching Officer Martinez in the temple with his right fist. Officer Martinez “immediately went down to the ground,” her head struck the pavement and she lost consciousness.

Officer Vazquez testified that when his partner hit the ground, he holstered his weapon; Avila jumped on Officer Vazquez and started punching the officer. Officer Vazquez grabbed Avila by his torso, wrestled Avila to the ground and straddled Avila. Avila’s mother grabbed Officer Vazquez by the back and tried to pull him off her son. Officer Vazquez pushed the mother away or punched her, he could not recall which, and as he turned back around to continue his fight to subdue Avila, Avila punched Officer Vazquez in the left eye. Officer Vazquez testified that he commanded Avila to stop fighting, but Avila replied, “Fuck you, Vazquez. You cannot stop VNE.”

Officer Martinez got up from the ground but was stumbling and disoriented. As she regained her “composure,” she saw Avila and Officer Vazquez “engaged in a full fight” on the ground. Officer Martinez testified that Avila and Officer Vazquez were throwing punches at each other, and Avila’s mother was standing directly behind Officer Vazquez, trying to pull him off Avila. Officer Vazquez testified that he told Officer Martinez several times to make another call for backup because Officer Martinez did not appear to understand or realize where she was.

Officer Martinez did not know how long she was unconscious, but after seeing Avila and Officer Vazquez fighting on the ground, she used her walkie-talkie to call for back up. She pulled Avila's mother away from Officer Vazquez and told the mother to stay back. Officer Martinez testified that in order to get Avila to stop fighting and take him into custody, she began punching him in the face.

Officer Vazquez testified that he was unsure whether Officer Martinez called for backup so he removed his walkie-talkie and radioed for help. Officer Vazquez then felt Avila reach for his gun so he struck him several times in the face with his walkie-talkie. Officer Martinez also testified that she saw Avila's hand on Officer Vazquez's gun and she could not ascertain whether the holster was undone or whether the safety lock on the gun was in place. Officer Martinez stated that she was afraid that Avila "was going to kill my partner and myself [*sic*]" if she did not stop him. Officer Martinez, therefore, kicked Avila in the face and the head, hit him with her walkie-talkie and used a collapsible baton, or bully stick, to hit Avila's legs.

Officer Martinez testified that the fight seemed to go on for so long that she did not believe help was coming. She further testified that during training, officers are taught that these kinds of fights are "life and death situations," and she believed she was fighting for her life. Although Officer Vazquez later learned, based on the timing of the initial backup call and the appearance of backup at the scene, that the altercation only lasted five minutes, at the time he felt like it lasted "forever." Officers Vazquez and Martinez testified that Avila continued to punch Officer Vazquez throughout the entire incident. According to both officers, they were never able to handcuff Avila, and he never complied with their commands to cease fighting. The altercation ended only after the backup officers arrived and took Avila into custody.

After the incident, Officer Martinez was transported to the hospital where she received stitches on her elbow and treatment for a concussion. At the time of trial, almost a year after the altercation, Officer Martinez still suffered headaches and dizziness from the concussion. Officer Vazquez suffered bruising throughout his face, an abrasion on his left temple and a cut under his left eye that required surgical glue to close. Officer Vazquez testified that in the days following the fight, his eye swelled almost completely shut.

3. *Other Prosecution Evidence Presented At Trial*

On March 28, 2014, LAPD Detective Tyler Lee searched the vehicle that Avila tried to enter when Officers Vazquez and Martinez first initiated the felony stop. He found a handgun on the floorboard behind the front passenger seat, and an AK-47 rifle on the rear seat inside a soft guitar case. The handgun was loaded with a magazine containing 12 bullets, and the AK-47 was loaded with a magazine containing 29 bullets, plus one bullet in the chamber. Lee did not see any luggage, boxes or bags inside the vehicle or the trunk. He also searched Avila's bedroom, in which he observed a firing range target marked with multiple holes.

The parties stipulated that Detective James Kwon, a firearms expert, would testify that the AK-47 was operable and "without any defect" when it was tested. The parties also stipulated that Avila had previously been convicted of a felony under section 422.

C. *Defense Evidence*

Ricardo Chanocua met Avila through work, and in 2013 he went with Avila to a shooting range. According to Chanocua, while he was using Avila's AK-47, it "got jammed" and would not shoot. Chanocua took the AK-47 into the shop at the shooting range, and when he came out he told Avila it needed to be cleaned. Afterward, they were able to continue shooting the AK-47.

Avila testified in his own defense. He was 26 years old in March of 2014, and had lived in Estrada Courts most of his life. He admitted that he became a member of the VNE gang at age 16, and that he was convicted of two felonies in 2009 that he committed while he was a member. He also testified that he got two VNE tattoos when he was 20 years old, one on his leg and one on his head, although at that time he had “stopped hanging out with” VNE. Avila further admitted that in December 2013 he purchased an AK-47 and in March 2014 he purchased a handgun. He stated that he was aware that he was prohibited by law from owning firearms based on his previous felony convictions, but he did not believe unlawfully owning a firearm or “carrying around an AK-47” was “wrong.”

According to Avila, he purchased the AK-47 so that he could shoot it recreationally. In January 2014, the AK-47 “malfunctioned” while Chanocua was attempting to fire it at a shooting range. The next time Avila used the AK-47 was on March 26, 2014. According to Avila, Becerra and Corona had been drinking, taking pills and smoking methamphetamine that night before they met him. After meeting Becerra and Corona, they went to Avila’s home, and all three of them drank beer and smoked methamphetamine. At one point in the evening, Becerra asked to see the AK-47, so Avila retrieved it and the three went outside. Avila denied saying he had to “patrol [his] hood,” and denied getting into an argument with Corona. According to Avila, he wanted to unload the gun, since there was a live round of ammunition in the chamber, so he removed the clip. As he was trying to release the round from the chamber, the gun went off. When the gun discharged, it was pointed towards the ground. Corona, who was walking towards Avila, was struck and fell.

Avila denied saying to Becerra, “get up, little bitch, you’re next,” or anything similar. According to Avila, his immediate priority after he shot Corona was getting her to the hospital. He picked her up and carried her over his shoulder to his car. Avila testified that he used his sweater to wrap Corona’s leg, told her she was “going to be okay,” then drove her to the hospital.

As for his arrest on March 28, 2014, Avila explained that, around 4:30 a.m., he and his mother began loading his belongings into his car in preparation to move to his aunt’s house in La Puente. He testified that he placed his AK-47 in the back of his car when he saw a police car approaching him. He dropped his handgun onto the floorboard, closed and locked the car door and then walked towards his mother. The police car stopped in front of Avila and his mother, and Officers Vazquez and Martinez got out.

Avila testified that he did not know Officer Martinez, but he knew Officer Vazquez and believed he was a “crooked police officer.” According to Avila, Officer Vazquez used to “constant[ly] harass[]” Avila, and on one occasion Officer Vazquez grabbed Avila “by the neck and start[ed] slamming [him] into [a] door.”

Avila testified that when Officers Vazquez and Martinez exited their vehicles the morning of March 28, 2014 at 4:30 a.m., they drew their weapons, pointed them at Avila and his mother and began “rush[ing]” them. After Avila stepped in front of his mother, Officer Martinez said “I’m going to shoot. Don’t move. I’m going to fucking shoot you.” She was standing approximately three feet away from Avila and “out of fear,” Avila punched Officer Martinez. Avila testified that he hit Officer Martinez because he “felt like [he] had to” because he “didn’t know what she was going to do.” He believed “she could probably shoot [him] or she could probably shoot [his] mother.”

According to Avila's testimony, after he hit Officer Martinez and she fell to the ground unconscious, Officer Vazquez "tackled [him]," and the two men fell to the ground. Avila testified that Officer Vazquez "got on top of" him and "began to punch him." Avila denied trying to fight Officer Vazquez and instead said that he "just put up [his] hands to block." Then Avila heard his mother screaming and saw Officer Vazquez reach back and punch the mother in the face. Officer Martinez then got up and "slamm[ed]" his mother into a van. Avila testified that both he and his mother were begging the officers to stop. He further testified that while he was "just laying [sic] there" and "not fighting" or "resisting" arrest, Officer Vazquez looked at Avila "directly in the eyes and he said I'm going to fucking kill you."

Then, according to Avila's testimony, Officers Vazquez and Martinez "began punching" him. Officer Martinez kicked Avila in the face and hit him in the head with a baton, and the "only thing [Avila] was trying to do was protect [his] face." Officer Vazquez never told Avila he was under arrest and never told Avila to stop. Avila felt he "had no other option [but] to try to hit him back," so he punched Officer Vazquez once. Avila did not know how long the altercation lasted, but eventually more police officers arrived.

According to Avila, these officers handcuffed him and then "started to kick [Avila] also." Avila did not resist them and "did exactly what they told" him to do, "spread[ing] out face down on the ground." While he was "just laying [sic] there," Officer Vazquez came over and "stomped on the back of [his] head, "[c]rushing [his] face into the pavement." Later, after Avila moved into the back of a police vehicle, Officer Vazquez opened the door and "began to punch [Avila] in the face with his fist." After Avila's eyes swelled shut, another officer that Avila could not see opened the door and also "began to punch" him. Avila heard his mother screaming, "God,

please. You're killing my son." Officers told Avila to get out of the police car and "stand up," but he was unable to do so. He fell to the ground. Officers put him on a stretcher and transported him to the hospital. Avila testified that his injuries included a fractured nose, a cracked tooth, multiple lacerations and swelling and bruising all over his body.

Christel Perez testified on behalf of Avila, stating that she was living in the Estrada Courts housing on March 28, 2014. That morning, at approximately 4:15 a.m., she was woken up by screams. She looked outside her window and saw a female officer "kicking and beating someone." After "fifteen to twenty minutes" of kicking, an ambulance and police officers arrived. Perez never saw Avila strike any police officer, but she acknowledged on cross examination that her view was obscured and she could only see the female officer from her window and could not "make out what was going on with the people on the ground." She did not see Avila or Officer Vazquez.

Another neighbor, Reina Estrada, testified on behalf of defendant. At about 4:30 a.m., Estrada heard Avila's mother on the street yelling for help. Estrada came outside and saw numerous officers, a puddle of blood and Avila's mother, who was near the fence crying and screaming that officers had killed her son. Several officers were telling the mother to be quiet. Estrada did not witness any of the altercation between Avila and Officers Vazquez and Martinez or the backup officers who arrived on the scene later.

D. *Conviction and Sentencing*

On January 30, 2014, a jury found Avila guilty of all counts charged except counts 2 and 5. It hung as to count 2 (dissuading a witness, specifically Gerardo Becerra) and found Avila guilty of simple battery upon Officer Vazquez (in violation of §§ 242 and 243), a misdemeanor and lesser included offense to that charged in

count 5. The jury also hung on the gang enhancement. Avila admitted his prior serious felony conviction.

On March 30, 2015, the court sentenced Avila to a prison term of 18 years. For the base term in count 4 (battery with great bodily injury against Officer Martinez), the trial court imposed the middle term of three years, doubled pursuant to section 1170.12, subdivision (c)(1) (prior felony conviction enhancement), plus three years pursuant to section 12022.7 (the great bodily harm enhancement) and five years pursuant to section 667.5, subdivision (a) (violent felony enhancement). As consecutive subordinate terms, the trial court imposed 1 year 4 months in count 1 (discharging a firearm with gross negligence) and 2 years 8 months on count 10 (assault upon a peace officer). The trial court imposed concurrent terms of two years each for counts 3, 6 and 7. Pursuant to section 654 the court stayed sentence on counts 5 and 9. The court granted the prosecution's motion to dismiss count 2 and the gang allegation. Avila received 422 days of custody credit, calculated as 367 days of actual custody credit and 55 days good time/work time conduct credit. Additionally, the court ordered Avila to pay various fines and fees.

Avila filed a timely notice of appeal.

DISCUSSION

I. *Substantial Evidence Supports Avila's Convictions*

A. *Appellate Review of Sufficiency of Evidence*

In evaluating an insufficient evidence challenge, we do not reweigh the evidence. Rather, we “examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Kraft* (2000))

23 Cal.4th 978, 1053.) We presume in “support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.” (*Ibid.*) Weaknesses, inconsistencies or contradictions between one witness’s testimony and that of others does not require reversal. (*People v. Allen* (1985) 165 Cal.App.3d 616, 623.) On appeal, we must accept that part of the testimony which supports the judgment. (*In re Daniel G.* (2004) 120 Cal.App.4th 824, 830.)

B. *Substantial Evidence Supports the Jury’s Finding that Avila’s Assault Against Officer Vazquez Was Committed by Means Likely to Produce Great Bodily Harm*

Avila argues that there was insufficient evidence that he had the ability to or did apply force to Officer Vazquez likely to produce great bodily injury because “[m]erely punching Vazquez with his fist, but without using any weapon or object, was not reasonably likely to result in great bodily injury.” We disagree.

Any person “who commits assault . . . likely to produce great bodily injury upon the person of a peace officer . . . and who knows or reasonably should know that the victim is a peace officer . . . engaged in the performance of his or her duties” violates section 245, subdivision (c). The crime “‘is directed at the force used,’ ” and does not require that the force “‘actually results in any injury.’ ” (*People v. White* (2015) 241 Cal.App.4th 881, 884.) Evidence of injuries actually sustained, however, may support a jury’s determination that the force used was likely to produce great bodily injury. (*People v. Pullins* (1950) 95 Cal.App.2d 902, 904.)

Avila cites no authority, and we found no authority, supporting his contention that punching alone, without any weapon or object, cannot, as a matter of law, support the “likely to produce great bodily injury” element of the offense. Whether a punch is likely to produce great bodily injury depends on the facts. Here, the facts are sufficient to support that element.

Avila contrasts the single blow to Officer Martinez with the facts surrounding the altercation with Officer Vazquez, arguing that (1) The latter was not likely to produce great bodily injury because Officer Vazquez was bigger than Avila; (2) Officer Vazquez only sustained minor injuries; and (3) Officer Vazquez was straddling Avila during their altercation, “a position severely limiting [Avila’s] ability to strike a forceful blow.” We reject these arguments.

That Avila did not succeed in knocking Officer Vazquez unconscious with a single punch, as he did Officer Martinez, did not make his multiple punches to Avila less likely to result in great bodily injury. That Avila was smaller than Officer Vazquez does not undercut his ability to cause such injury. Although he was smaller, he was decades younger than Officer Vazquez and, based on his punch to Officer Martinez, capable of landing a single knock-out blow. Nor did Officer Vazquez’s position straddling Avila render his punches weak. As Avila’s own testimony demonstrated, the fight between the two lasted for several minutes, and Officer Vazquez was unable to subdue Avila. Avila’s actions throughout his encounter with the officers demonstrated that he was not going to submit to arrest and he would use all his force to resist it. Finally, although Avila attempts to minimize Officer Vazquez’s injuries, Officer Vazquez sustained great bodily injury—bruising throughout his face, an abrasion on his temple, a cut under his left eye that required surgical glue to close and an eye that swelled almost completely shut a few days after the fight. Accordingly, the jury’s finding is supported by substantial evidence.

C. *Substantial Evidence Supports the Jury Finding That the Officers Were Lawfully Performing Their Duties and Avila Was Not Acting in Self Defense*

A necessary element of section 245, subdivision (c), is that “the officer at the time of the arrest must be engaged in the performance of his [or her] duties.” (*People v. White* (1980) 101 Cal.App.3d 161, 166.) A trial court, therefore, is required to instruct the jury that if a defendant’s “arrest was made with excessive force, the arrest was unlawful and [it] should find the defendant not guilty.” (*Id.* at p. 167.) Here, it is undisputed that the trial court properly instructed the jury. Avila argues, however, that the officers used excessive force and he acted in self-defense and the “instructions were either misunderstood or ignored by the jury, since their verdict is contrary to the evidence.” We disagree.

When determining whether an officer used excessive force, a jury must consider the totality of the circumstances including: (1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether he is actively resisting arrest or attempting to evade arrest by flight. (*Graham v. Connor* (1989) 490 U.S. 386, 396.) The “reasonableness” of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. (*Ibid.*)

Here, all three of the factors outlined in *Graham* favor the reasonableness of the force used by the officers. First, as to the severity of the crime, before the officers approached Avila, they were informed that Avila was wanted for assault with a deadly weapon and making criminal threats. Once officers spotted Avila, they commanded him to stop, show his hands and step away from his vehicle. Second, rather than complying with their orders, and even *after* the officers had holstered their guns, Avila punched Officer

Martinez, knocking her unconscious, demonstrating he posed an immediate threat to the safety of the officers. Third, after Avila punched Officer Martinez, he continued to resist arrest by fighting with Officer Vazquez and attempting to take his firearm.

Avila claims that the officers used excessive force in their initial contact by drawing their weapons and yelling at him when they first approached him. Avila argues that he was unaware that he was under arrest and it was the officer's initial armed confrontation that caused him to punch Officer Martinez. Whether the officers used the specific words "you are under arrest" is of no moment. They were obviously police officers. Nor did he deny that he knew they were police officers. Indeed, he admitted that he knew one of them in that capacity. (*People v. Montiel* (1993) 5 Cal.4th 887, 915-916 [where a person knows or reasonably knows that he is being arrested by a peace officer, "he has a duty to refrain from forcible resistance"].) Further, the officer's information about the nature of the reported crime, Avila's prior gang involvement, their inability to see his hands, the hour of the night, and the gang location of the encounter, all justified the drawing of their guns. In any case, before Avila punched Officer Martinez, both officers had returned their guns to their holsters.

Avila also argues that even if the officers' use of force at the beginning of the encounter was reasonable, it escalated to excessive force once he stopped resisting arrest, which justified his use of self-defense. According to Avila's testimony he only hit Officer Vazquez once but, in retaliation for his punching Officer Martinez, the officers punched, kicked and hit Avila with a bully stick and their walkie-talkies when he was already subdued. In support of his version of the events he points out that he suffered severe injuries while Officer Vazquez suffered only minor ones.

The officers, in contrast, testified that they only used the amount of force necessary to subdue Avila and stopped using force once he ceased posing a dangerous threat. As to the relative degree of the injuries, that alone does not demonstrate that the police used excessive force. Equally plausible is that the severity of Avila's injuries was due to his continued resistance to arrest. In any case, the record shows that Officer Vazquez's injuries were not trivial even compared to Avila's. Thus, because the evidence supporting the jury's finding rejecting self defense was not a "physical impossibility," demonstrably false or unsupported by substantial evidence, we must reject Avila's challenge. (*People v. Friend* (2009) 47 Cal.4th 1, 41.)

II. *The Court Erred In Imposing The Great Bodily Harm Enhancement On Count 4*

The Attorney General concedes, and we agree, that the trial court erred by enhancing Avila's sentence in count 4 (battery of Officer Martinez) with a three-year consecutive term under section 12022.7. The parties disagree, however, regarding the remedy for the impermissible enhancement. Avila argues that the enhancement must be stricken as to count 4 and his sentence should, therefore, be reduced by three years. Respondent, in contrast, argues that we should remand the case to allow the trial court to resentence Avila by imposing the enhancement on count 9 (assault on a peace officer likely to produce great bodily harm) instead. We agree with respondent and remand the case for resentencing.

A. *Relevant Procedural History*

The information charged Avila in count 4 with battery with serious bodily injury upon Officer Martinez (§ 243, subd. (d)). The information further charged Avila in count 9 with assault on a peace officer by means likely to produce great bodily injury also upon

Officer Martinez (§ 245, subd. (c)). Both incidents were alleged to have occurred on March 28, 2014 and were “alternate charg[es]” for the same criminal act—punching Officer Martinez.

The information contained a special allegation that Avila personally inflicted great bodily injury upon Officer Martinez during the commission of count 4 (§ 12022.7, sub. (a)). The information did not allege this special allegation as to count 9. Nor were other allegations alleged as to count 9, including the prior prison term or the prior strike allegations. The verdict forms submitted to the jury included the special verdict for the great bodily injury enhancement only as to count 4.

Ultimately, Avila was convicted by the jury on counts 4 and 9, and the jury found the great bodily enhancement to be true. The trial court selected the middle term of three years in count 9, which was doubled as a result of Avila’s prior strike, and added three years for the great bodily injury enhancement. The sentence on count 9 was stayed pursuant to section 654.

B. *The Section 12022.7 Enhancement on Count 4 Must Be Stricken*

Section 12022.7 requires that a three-year enhancement be added to the term imposed on any felony if the defendant intentionally inflicted great bodily injury upon the victim during the commission of the felony. (*People v. Hawkins* (1993) 15 Cal.App.4th 1373, 1375 (*Hawkins*).) Section 12022.7, subdivision (g), however, provides that, except in cases of domestic violence, a great bodily injury enhancement does not apply “if infliction of great bodily injury is an element of the offense.”

Battery is a punishable felony under section 243, subdivision (d) only if the battery causes “serious bodily injury” to the victim. (*Hawkins, supra*, 15 Cal.App.4th at p. 1375.) Because the “terms ‘serious bodily injury’ and ‘great bodily injury’ have

substantially the same meaning,” great bodily injury is an element of battery under section 243, subdivision (d). (*Ibid.*) The parties, therefore, agree that Avila’s sentence for battery with serious bodily injury in count 4 may not be enhanced under section 12022.7. (See *id.* at p. 1376.)

C. *The Case Should Be Remanded for Resentencing so the Enhancement Can Be Imposed on Count 9*

Avila argues that, because the information only alleged the section 12022.7 enhancement as to count 4, and the jury found the enhancement to be true only to count 4, the enhancement cannot be imposed on any other count. Avila further contends that we should modify the judgment to stay execution of the three-year enhancement, without the necessity of remand, and order the trial court to instruct the clerk to amend the abstract of judgment accordingly.

Respondent, in contrast, argues that we should remand the case to the superior court and instruct it to apply the section 12022.7 enhancement to Avila’s conviction in count 9 for assault upon a peace officer by means likely to produce great bodily injury.

Unlike battery with serious bodily injury under section 243, subdivision (d), assault by means likely to produce great bodily injury under section 245 does not require proof that the assault actually resulted in an injury, nor does the penalty for assault “contemplate punishment for the infliction of great bodily injury.” (*People v. Parrish* (1985) 170 Cal.App.3d 336, 343.) A defendant who is convicted of assault by means likely to produce great bodily injury may have his or her sentence enhanced under section 12022.7 if the assault actually results in the infliction of great bodily injury. (*Id.* at p. 344).

Avila does not contest that as a general matter a section 12022.7 enhancement may properly be imposed on a conviction for

assaulting a peace officer by means likely to produce great bodily injury. Rather, Avila asserts that the enhancement cannot be applied to his sentence on count 9 because “the People did not charge a [great bodily injury] enhancement as to [c]ount 9.” Avila fails to acknowledge, however, that the section 12022.7 enhancement was charged and pleaded as to count 4, which was predicated upon the *exact same* criminal act as count 9—Avila punching Officer Martinez in the face thereby rendering her unconscious. Moreover, the jury made an express finding that the allegation was true.

In a similar case, Division Seven of our court noted that “although the better practice is to allege the enhancement with respect to every count on which the prosecution seeks to invoke it, the failure to do so is not fatal so long as the defendant has fair notice of his potential punishment.” (*People v. Riva* (2003) 112 Cal.App.4th 981, 985 (*Riva*).) In *Riva*, the court concluded that the defendant had been given adequate constitutional notice as to his 25-year-to-life enhancement for discharging a firearm causing great bodily injury, even though the information did not allege the enhancement as to the count on which it was imposed. (*Id.* at pp. 1000-1001.) The defendant fired his gun at the occupants of a vehicle that was stopped at a stoplight, but missed and instead hit an innocent bystander. Based on this act, the defendant was charged with attempted voluntary manslaughter, assault with a firearm and discharging a firearm at an occupied vehicle. (*Id.* at p. 986.) The information also alleged an enhancement that the defendant personally discharged a firearm causing great bodily injury, but only as to the attempted voluntary manslaughter and assault charges. (*Id.* at p. 1000.) Although the information did not allege the enhancement as to the charge for shooting at an occupied vehicle, the trial court imposed it upon that count only, staying

the sentence as to the other two counts pursuant to section 654. (*Id.* at pp. 1000-1001.) The *Riva* court concluded that because the defendant was given adequate notice that he would have to defend against the allegation as it related to the manslaughter and assault counts, the defendant was not deprived of his due process rights to notice of the charges against him. (*Id.* at pp. 1001-1002.)

Similarly, in Avila's case, he was given adequate constitutional notice of the charges against him because the information expressly alleged that Avila caused great bodily injury upon Officer Martinez and this allegation "was pled by number and description as to some of the counts in the information." (*Riva, supra*, 112 Cal.App.4th at p. 1002.) Additionally, Avila could not have been confused as to which criminal act caused the serious bodily injury because Officer Martinez only suffered one injury that was presented to the jury as a great bodily injury, and because the battery in count 4 and the assault in count 9 were expressly presented to the jury as "alternate charg[es]" for the same criminal act upon Officer Martinez—punching her in the head. Moreover, Avila took the position throughout the trial that he did not cause Officer Martinez to suffer great bodily injury

Therefore, the record demonstrates that Avila was given adequate notice of the charges against him and of the prosecution's intent to use the allegation to enhance Avila's sentence under section 12022.7, and it demonstrates that Avila responded to this notice by actually presenting a defense to the charge—that Officer Martinez sustained no serious injury. The jury rejected Avila's argument and expressly found the allegation to be true. Therefore, upon remand, the trial court's imposition of the section 12022.7 enhancement on count 9 would not violate Avila's due process rights.

Under section 1170.1, subdivision (a), where a defendant is convicted of two or more felonies and consecutive sentences are

imposed, the trial court must select as the principle term “the greatest term of imprisonment imposed by the court for any of the crimes, including any term imposed for applicable specific enhancements.” Although the high term for count 9 was five years (per section 245, subd. (c)) and the high term for count 4 was four years (per section 243, subd. (d)), the trial court selected count 4 as the principle term under the mistaken belief that the great bodily injury enhancement could be imposed only on count 4. On remand, the trial court may select count 9 as the principle term and exercise anew its discretion on all aspects of Avila’s sentence. (See, e.g., *People v. Kelly* (1999) 72 Cal.App.4th 842, 846 [aggregate sentences are “a single continuous term of confinement to be reviewed in its entirety, if error occurs”].) Upon remand, however, the trial court may not impose a sentence that exceeds Avila’s original sentence of 18 years in prison. (*People v. Hanson* (2000) 23 Cal.4th 355, 357 [“When a defendant successfully appeals a criminal conviction, California’s constitutional prohibition against double jeopardy precludes the imposition of more severe punishment on resentencing.”].)

III. *Upon Remand, Avila’s Sentence On Count 5 Should Be Modified To Six Months In County Jail*

The Attorney General concedes, and we agree, that the trial court erred when it imposed a three-year sentence on count 5. Avila was charged in count 5 with battery with serious bodily injury on Officer Vazquez, the middle term for which is three years in prison per section 243, subdivision (d). The jury, however, found Avila guilty of the lesser included offense of misdemeanor battery, which is punishable by a term of six months in jail per section 243, subdivision (a). Accordingly, upon remand the trial court should resentence Avila on count 5 to six months in jail stayed pursuant to section 654.

DISPOSITION

The judgment of conviction is affirmed, and the matter is remanded to the trial court for resentencing in accordance with this opinion. Specifically, the trial court should: (1) strike the section 12022.7 enhancement as to count 4; (2) consider imposing the enhancement instead on count 9; (3) reconsider its discretionary sentencing choices with the limitation that Avila's new aggregate term may not exceed his original sentence; and (4) Avila's sentence on count 5 should be modified to six months in jail stayed pursuant to section 654.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

LUI, J.